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Supreme Court, U.S.
FILED
JUN 6 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. 90-21

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JOHN MARTINSON - PETITIONER

vs.

FARM CREDIT BANK OF ST. PAUL,
FORMERLY KNOWN AS THE FEDERAL LAND
BANK OF ST. PAUL, A CORPORATION -
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Due Process clause of the Fourteenth Amendment require that an owner of fixtures on land of a landlord, which ownership interest appears of record, be granted notice and an opportunity to be heard before his interest in the fixtures may be foreclosed by the landlord's mortgagee?

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NO._____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

OCTOBER TERM, 1990

JOHN MARTINSON - PETITIONER

vs.

FARM CREDIT BANK OF ST. PAUL,

FORMERLY KNOWN AS THE FEDERAL LAND

BANK OF ST. PAUL, A CORPORATION -

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Petitioner, John Martinson, respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of the State of North Dakota holding that North Dakota Century Code § 47-06-04 permits a landlord's mortgagee whose mortgage interest was subsequent in time to the record interest of Petitioner, to foreclose both its mortgage from Petitioner's landlord and Petitioner's record interest in fixtures on the landlord's real property, without giving notice of the pendency of the foreclosure action to Petitioner, when Petitioner's interest in the fixtures appeared of record in the office of the register of deeds prior to the time of commencement of such foreclosure action.

OPINIONS BELOW

The opinion of the Supreme Court of the State of North Dakota has not yet been reported. It is reproduced in Appendix A to this Petition. The letter of the Clerk of the

Supreme Court of the State of North Dakota denying Petitioner's petition for rehearing is reproduced in Appendix D.

JURISDICTION

The opinion of the Supreme Court of the State of North Dakota in this matter was filed on March 29, 1990. Petitioner filed a timely petition for rehearing on April 13, 1990. The Supreme Court of the State of North Dakota entered its order denying the petition for rehearing on April 27, 1990. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution is set forth in Appendix H.

STATEMENT OF THE CASE

Petitioner, John Martinson, farms in Dickey County,

North Dakota. He leased land from his mother, Agnes Martinson, and upon this land he erected a total of twelve grain bins. There were also recorded in the office of the Register of Deeds of Dickey County, North Dakota, several financing statements pursuant to the North Dakota Uniform Commercial Code setting forth of record Petitioner's interest in the grain bins, and the fact that the bins were financed by the Commodity Credit Corporation. However, there was no recorded severance agreement between Petitioner and Agnes, nor did Petitioner file with the register of deeds a statement of his intent to remove the grain bins at the termination of the tenancy.

Thereafter, in 1981, Agnes executed a promissory note and mortgage in favor of the Farm Credit Bank of St. Paul, formerly known as the Federal Land Bank of St. Paul (hereinafter "FCB"), by which she granted to FCB a mortgage on the land on which the grain bins were situated. Agnes eventually defaulted on her loan to FCB.

FCB sent a "Notice of Intent to Foreclose" to both Agnes and separately to Petitioner, advising them of Agnes' default and of its intent to begin foreclosure proceedings in the event the default was not cured. Agnes did not cure the default and foreclosure proceedings were thereafter instituted by FCB, but the only named Defendant was Agnes Martinson. Despite Petitioner's record interest in the grain bins located on his mother's land, and despite the fact that FCB had given Petitioner notice of Agnes' default and of its intent to foreclose if the default were not cured, he was not joined as a party defendant to the foreclosure proceedings, and no notice was ever given to him that Agnes had not cured the default, or that foreclosure proceedings concerning the land in question had in fact been instituted. During the course of the proceedings Petitioner did learn of the pending foreclosure, but took no action when he learned he had not been named as a party defendant.

A judgment of foreclosure was ultimately rendered against Agnes, by her consent, on September 21, 1987. This judgment ran against Agnes only. Notice of entry of judgment was given to Agnes, but not to Petitioner. A sheriff's sale was held November 10, 1987, but no notice thereof was given to Petitioner although notice was published in the Dickey County Leader, a local newspaper. At the sale the land was sold to FCB as mortgagee. On November 16, 1988, the sheriff issued the usual deeds to FCB. On November 23, 1988, FCB sent a letter to Agnes notifying her of her rights of first refusal under the Agricultural Credit Act of 1987. No such notice was given to Petitioner.

Even after the sheriff's deeds were issued Petitioner continued his use of the land and of his grain bins. On March 6, 1989, FCB sent a "Notice to Quit" to Petitioner and to Agnes. On March 15, 1989, FCB commenced eviction proceedings to remove Petitioner and his mother from

possession of the land. On April 5, 1989, a trial was held in the County Court of Dickey County, North Dakota. At that trial Petitioner presented as one of his arguments lack of due process, based upon his not having been joined as a party defendant to the foreclosure proceedings, nor having been given any notice that foreclosure proceedings had, in fact, been commenced. Petitioner was not represented by counsel in the trial of the eviction action, but was later represented by counsel on a motion for new trial and on appeal to the North Dakota Supreme Court.

The county court ruled against Petitioner. A motion for a new trial was made and a hearing on that motion was held in the county court on May 17, 1989. At this hearing Petitioner was for the first time represented by counsel. The county court denied Petitioner's motion for a new trial and Petitioner filed a timely notice of appeal and stay with the North Dakota Supreme Court, the sole issue being whether Petitioner's due process rights

under the United States Constitution, Amendments V and XIV, had been violated. The North Dakota Supreme Court relied on North Dakota Century Code § 47-06-04 to rule that ownership of the bins no longer resided in Petitioner but in FCB, and also ruled notice to Petitioner was therefore not necessary in order to adjudicate Petitioner's rights with respect to his grain bins.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for one reason: the opinion of the Supreme Court of North Dakota, and North Dakota Century Code § 47-06-04, appear to conflict with this Court's decision in *Tulsa Professional Collection Services, Inc. v. Pope,* 485 U.S. 478, 99 L.Ed. 2d 565, 108 S.Ct. 1340 (1988).

It is well established that "state action which affects property must generally be accompanied by notification of that action." *Pope,* infra, at 484, 99 L.Ed. 2d 574, 108 S.

Ct. 1348, citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 94 L.Ed. 865, 70 S. Ct. 652 (1950). This Court had previously held that "actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 800, 77 L.Ed. 2d 180, 103 S.Ct. 2706 (1983) (emphasis in original). "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363, 1369 (1914).

Not every procedure is subject to such due process requirements however, it having been held that the Fourteenth Amendment protects only against deprivation *by state action*. Private action, even the use of state-created or approved self-help remedies, is not "state

action" such that the Fourteenth Amendment's due process protections attach to the action. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 56 L.Ed. 2d 185, 98 S.Ct. 1729 (1978). State action does exist, however, when parties make open and substantial use of state officials. *Lugar v. Edmondson Oil Co.*,457 U.S. 922, 73 L.Ed. 2d 482, 102 S.Ct. 2744 (1982).

The nub of the instant case is not whether Petitioner's interest in his grain bins was a property right sufficient to be entitled to due process protections. Nor is the issue herein whether state action was present in the foreclosure or eviction actions, for it is difficult to conceive of any party who is more an official of the state than a judge. The issue presented herein is rather whether a state can, by statute, deprive a fixture owner of a hearing to determine the nature and extent of his interest in the fixtures. The opinion of the North Dakota Supreme court appears to interpret the statute such that no hearing need

be afforded the owner of fixtures to real property.

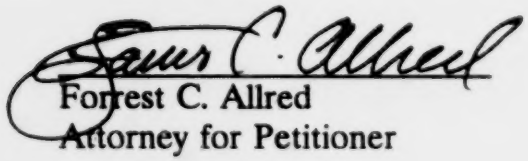
This Court should take this opportunity to clarify its holdings in *Pope, Mennonite,* and *Mullane, supra,* to hold that the North Dakota statute unconstitutionally deprives fixture property owners of their Fourteenth Amendment due process rights.

CONCLUSION

For the reasons set forth above a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of North Dakota in this matter.

Dated June 4, 1990.

Respectfully Submitted,



Forrest C. Allred
Attorney for Petitioner

Appendix A

Opinion of North Dakota Supreme Court

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Farm Credit Bank of St. Paul,
formerly known as the Federal
Land Bank of St. Paul,
a corporation, Plaintiff and Appellee

v.

Agnes Irene Martinson, Defendant

and

John Martinson, Defendant and Appellant

Civil No. 890237

Appeal from the County Court for Dickey County, Southeast Judicial District, the Honorable Gary D. Neuharth,Judge.

AFFIRMED.

Opinion of the Court by VandeWalle, Justice.

Jon R. Brakke of Vogel, Brantner, Kelly, Knutson, Weir & Bye, Ltd., Fargo, for plaintiff and appellee.

James R. Britton, Rolla, for defendant and appellant.

FARM CREDIT BANK OF ST. PAUL v. MARTINSON

Civil No. 890237

VANDE WALLE, Justice.

John Martinson appealed from a judgment of eviction entered by the county court for Dickey County. Martinson contends that the court improperly determined that Farm Credit Bank of St. Paul was the owner of twelve grain bins situated on the property. We affirm.

John Martinson was a tenant on a farm owned by his mother, Agnes Irene Martinson. The farm was located in Dickey County. During his tenancy, John erected twelve grain bins on the leased farmland. John did not negotiate a severance agreement with Agnes regarding the removal of the grain bins upon the expiration of his tenancy, nor did John file a notice with the office of the register of deeds stating that he intended to remove the grain bins at the end of his lease term as permitted by

NDCC § 47-06-04.

In 1981, Agnes obtained a loan from Farm Credit Bank of St. Paul in the principal sum of $247,000. The loan was memorialized by a promissory note, and secured by a mortgage on her farmland. When Farm Credit Bank extended the loan to Agnes and recorded the mortgage, the twelve grain bins were already constructed and affixed to the farmland.

Agnes defaulted on the payment due under the note and Farm Credit Bank ultimately instituted foreclosure procedures. During the course of the foreclosure action a settlement was reached whereby Agnes consented to the entry of a judgment of foreclosure by Farm Credit Bank. Farm Credit Bank was the high bidder at the sheriff's sale and it was issued certificates of sale by the sheriff. During the redemption period Agnes redeemed a fifteen-acre parcel of the mortgaged property. The grain bins in controversy are not situated on the

fifteen acres redeemed by Agnes. The sheriff subsequently issued sheriff's deeds to Farm Credit Bank for the remaining unredeemed land.

After sheriff's deeds were issued to Farm Credit Bank, John and Agnes Martinson continued to pasture livestock and to store grain, farm machinery, and motor vehicles on the foreclosed property although Farm Credit Bank did not consent to the Martinsons' continued occupancy of the land. Farm Credit Bank eventually commenced an eviction proceeding in the county court for Dickey County. A hearing was held on the eviction action and the county court subsequently issued its findings of fact, conclusions of law, and order for judgment. In its findings of fact the court determined that Farm Credit Bank acquired deeds to the farmland in issue through its foreclosure proceeding, that the grain bins erected by John Martinson constituted fixtures on the farmland and became a part of the property acquired by Farm Credit

Bank through its foreclosure, and that John and Agnes Martinson were currently pasturing cattle, storing farm equipment, and storing agricultural commodities upon Farm Credit Bank's land. The trial court ordered John and Agnes Martinson to remove their property from the subject real estate.

On appeal, John Martinson argues that the twelve grain bins he erected on the farmland during his tenancy were his personal property. Because he was not a party to the foreclosure proceedings, John contends that he was denied his due-process rights with respect to ownership over the grain bins when the county court found that the bins were fixtures on the property and that Farm Credit Bank had acquired ownership rights to the bins when it successfully foreclosed on Agnes's farmland. John appears to argue that title to the grain bins was determined in the foreclosure proceedings and that in order to protect his due-process rights he should have been made a party to

the foreclosure proceedings or, because he was nota party in those proceedings, the county court should have held the eviction action in abeyance until the district court has determined title to the grain bins in a separate action in which John is a party. We disagree.

Under NDCC § 47-06-04, when a tenant affixes his or her property to the land of another without an agreement for its removal, the property affixed belongs to the owner of the land upon the termination of the tenancy. *See also Schnaible v. City of Bismarck*, 275 N.W.2d 859 (N.D. 1979); *Frank v. Schaff*, 123 N.W. 2d 827 (N.D. 1963); *Gussner v. Mandan Creamery & Produce Co.*, 78 N.D. 594, 51 N.W.2d 352 (1952); *Klocke v. Troske*, 57 N.D. 404, 222 N.W. 262 (1928). However, § 47-06-04 also contains a special provision which applies to grain bins erected on leased premises by agricultural tenants:

> "When any tenant upon agricultural land shall have built, erected, or placed upon

> such leased premises during his tenancy, any grain bin, granary, or structure for the purpose of housing grain, and no written agreement between the landlord and the tenant has been made as to its removal, he may remove the same at any time within eight months after the termination of his lease and the vacating of said premises. *The tenant shall not have said right of removal as against the owner or holder of any mortgage, deed, or conveyance which shall have been filed and recorded after the building, erection, or placing of such bin, granary, or structure, unless such tenant, within sixty days after such building erecting or placing, shall have filed in the office of the register of deeds a written notice describing the land, the character of the structure, and stating that he intends to remove such structure as provided by law.*" (emphasis added).

Thus, in order for an agricultural tenant to preserve the right to remove a grain bin against a holder of a mortgage

recorded after the erection of the bin, the tenant must file a description of the bin and a notice of his or her intent to remove it with the county register of deeds. White & Skjerven, *A Survey of Laws Affecting Farm Tenancy*, 37 N.D.L. Rev. 158, 179 (1961).[1]

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[1] While stating that NDCC § 47-06-04 provides rather harsh rules for the removal of fixtures by tenants, *A Survey of Laws Affecting Farm Tenancy*, 37 N.D.L. Rev. 158, 179-80 (1961), notes the harshness of the statute may be mitigated by tenants if they comply with its terms. Thus, for example, the harshness of § 47-06-04 can be mitigated by constructing agreements with landlords regarding the removal of fixtures, or by filing a notice with the register of deeds stating that an agricultural tenant plans to remove grain bins at the expiration of his or her lease.

From our review of the record and transcripts of the county court eviction action, it is clear that the grain bins in controversy were erected on the leased property by John Martinson prior to the recordation of Farm Credit Bank's mortgage. Moreover, John Martinson did not file a notice with the county register of deeds which would have given Farm Credit Bank, as the holder of a mortgage, any notice of John's intention to remove the bins. When John failed to record a notice stating his intention to remove the bins at the end of his lease, he failed to preserve his right of removal against the subsequent mortgagee. As a result,there was no reason to include John as a party in the foreclosure proceedings. *Cf.* NDCC §§ 32-19-38, 32-19-39, 32-19-40. Farm Credit Bank became the owner of the real estate,including the grain bins, as a result of the sheriff's deeds, and was entitled to evict the Martinsons from the real estate and the use of the bins.

The judgment of eviction is affirmed.

/s/ Gerald W. Vande Walle

/s/ Vernon R. Pederson, S.J.

/s/ Herbert L. Meschke

/s/ William Hodny

/s/ Ralph Erickstad

Pederson, Surrogate Judge, and Hodny, District Judge, sitting in place of Gierke,J., and Levine, J. disqualified.

Appendix B

Findings of Fact and Conclusions of Law

and Order for Judgment

Dickey County Court

IN COUNTY COURT, DICKEY COUNTY,

NORTH DAKOTA

Farm Credit Bank of St. Paul, formerly known as the Federal Land Bank of St. Paul, a corporation,	)
Plaintiff,	)
vs.	)
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT	)
Agnes Irene Martinson and John Martinson,	)
Defendants.	)

The above entitled matter came on before this Court for hearing on the 5th day of April, 1989, at the hour of 10:30 o'clock a.m. in the courtroom of the Dickey County Courthouse, Ellendale, North Dakota, the Honorable Gary Neuharth, Judge of the County Court for Dickey County, presiding. The plaintiff was represented by its attorney, Jon R. Brakke of the firm of Vogel, Brantner, Kelly, Knutson, Weir & Bye, Ltd., the defendants were present personally. This Court having

considered the files and pleadings herein and the evidence and the arguments of the parties, makes the following findings of fact, conclusions of law and order for judgment.

FINDINGS OF FACT

1. The plaintiff is a body corporate organized and chartered and existing under the Act of Congress approved July 17, 1986 and Acts amendatory thereof, known and cited as the Federal Farm Loan Act. Effective July 6, 1988, the Federal Land Bank of St. Paul and the Federal Intermediate Credit Bank merged with the successor party in interest being Farm Credit Bank of St. Paul.

2. The defendant, Agnes Irene Martinson, executed a promissory note payable to Federal Land Bank of Saint Paul of date July 22, 1981. Said note was in the original principal sum of $241,000.00, and the principal balance due and owing thereunder bore interest at a variable rate with a base rate of 11.5% per annum.

3. To secure the payments to be made under the terms of the July 22, 1981 promissory note, the defendant Agnes Irene Martinson granted to Federal Land Bank of Saint Paul a mortgage in certain real property more fully described as:

> Lots 3 and 4; E 1/2 SW 1/4; All in Section 19, Township 129 North, Range 61 West;
>
> Lots 1, 2, 3 and 4; E 1/2 W 1/2; NE 1/4; All in Section 30, Township 129 North, Range 61 West;
>
> Lots 1, 2, 3 and 4; E 1/2 W 1/2; E 1/2; All in Section 31, Township 129 North, Range 61 West;
>
> All in the County of Dickey, State of North Dakota.

4. The defendant Agnes Irene Martinson defaulted on her payments to Federal Land Bank of Saint Paul, and as a consequence, Federal Land Bank of Saint Paul commenced an action in Dickey County District Court to foreclose on its mortgage.

5. Federal Land Bank of Saint Paul and Agnes Irene

Martinson entered into a stipulation for settlement of the Dickey County District Court mortgage foreclosure action.

6. Pursuant to the terms of the stipulation for settlement entered into between Federal Land Bank of Saint Paul and Agnes Irene Martinson, the Dickey County District Court, on or about September 21, 1987, entered a judgment of mortgage foreclosure in favor of Federal Land Bank of Saint Paul and against Agnes Irene Martinson.

7. In accord with the judgment of foreclosure entered in favor of Federal Land Bank of Saint Paul by the Dickey County District Court, Federal Land Bank was empowered to sell by Sheriff's Sale the real property subject to its mortgage.

8. The Clerk of the Dickey County District Court issued a special execution to the Dickey County Sheriff's office for sale of the mortgaged property, and on November 10, 1987 the mortgaged property was sold at Sheriff's sale.

9. The Federal Land Bank of Saint Paul was the highest bidder at the Sheriff's sale, and Sheriff's Certificates of Sale verifying sale of the mortgaged property to Federal Land Bank of Saint Paul were issued by the Dickey County Sheriff's office.

10. The Dickey County District Court entered an order confirming sale of the mortgaged property to Federal Land Bank of Saint Paul.

11. Agnes Irene Martinson redeemed the West 100 feet of the South 600 feet of the Southwest Quarter of Section 19, Township 129 North, Range 61 West of Dickey County, North Dakota, however, none of the other property sold at Sheriff's sale was redeemed during the year's redemption period existing under law.

12. With respect to the unredeemed property, the Dickey County Sheriff's office issued Sheriff's deeds of date November 16, 1988, transferring title to said property to Farm Credit Bank of Saint Paul. Said deeds were

recorded on November 16, 1988.

13. At the time Agnes Irene Martinson granted the subject mortgage to Federal Land Bank of Saint Paul, various improvements had been made to the mortgaged real estate including, but limited to, the erection of buildings, twelve steel grain bins, fence lines, etc. At the time the subject mortgage was given, five of the steel grain bins were being financed by John Martinson through various government agricultural loan programs. Federal Land Bank of Saint paul advanced funds to pay off liens on certain of the other grain bins at the time the mortgage was given.

14. As to any grain bins, fence lines, etc., erected by John or Agnes Martinson on the subject real estate, no severance agreement existed as between John Martinson and Agnes Irene Martinson, and/or Federal Land Bank of Saint Paul which would have allowed removal of said improvements at any subsequent time.

15. Any steel grain bins, fence lines, etc., placed by John or Agnes Martinson on the mortgaged property were intended to be of permanent nature and constituted fixtures and became part of the real property subject to Federal Land Bank of Saint Paul's mortgage.

16. After expiration of the redemption period and conveyance by the Sheriff of the non-redeemed property to Farm Credit Bank of Saint Paulo, Agnes Martinson was accorded her first refusal rights under the Agricultural Credit Act of 1987. On November 23, 1988, Farm Credit Bank of Saint Paul advised Agnes Martinson of the appraised value of the non-redeemed property and advised her of her purchase rights existing under the Agricultural Credit Act of 1987. Although considering the indicated appraised value of the separate parcels, the total appraised price figure appearing in the November 23, 1988 notice appears to be too high by $100.00, the actual error was a typographical error in the appraised value for Lots

1, 2, 3 and 4, the East Half of the West Half and the Northeast Quarter of Section 30, Township 129, Range 61, which had been appraised by Farm Credit Bank of Saint Paul at $101,100.00. Agnes Martinson was not mislead nor did she rely on this error in exercising her first refusal rights.

17. Farm Credit Bank of Saint Paul and Agnes Martinson subsequently negotiated as to the total appraised value figure, and Farm Credit Bank of Saint Paul agreed that for purposes of Agnes Martinson's repurchase rights under the Farm Credit Act of 1987, Farm Credit Bank of Saint Paul would deduct the value of certain grain bins from the total purchase price figure.

18. Agnes Martinson accepted Farm Credit Bank of Saint Paul's offer to sell by way of a letter of date January 3, 1989.

19. By way of a letter of date January 6, 1989, Farm Credit Bank of Saint Paul acknowledged Agnes

Martinson's expressed intent to exercise her repurchase rights and by way of said letter, provided Agnes Martinson with written confirmation of the compromise appraised value figure. Agnes Martinson then had 15 days in which to deliver full payment for the subject property.

20. Agnes Martinson failed to deliver full payment to Farm Credit Bank of Saint Paul within the 15 days allowed her by law, and indeed, as of April 5, 1989, was still unable to tender the agreed upon purchase price to Farm Credit Bank of Saint Paul.

21. In part, Agnes Martinson's inability to tender the cash price to Farm Credit Bank of Saint Paul was a consequence of her inability to obtain financing for the proposed purchase. Agnes Martinson's inability to obtain financing for the proposed purchase was not due to any acts or omissions of Farm Credit Bank of Saint Paul.

22. The defendants, Agnes Irene Martinson and John Martinson are presently exercising dominion and control

over the subject property by pasturing cattle thereupon and by storing farm equipment and agricultural commodities thereupon.

23. There is a 65 acre tract upon which the cattle are pastured and the farm equipment and commodities are stored. The reasonable rental value of this tract is $1.00 per acre per month.

24. On or about March 6, 1989, a Notice to Quit was served on the defendants and the defendants wholly refused and failed to comply with the same.

CONCLUSIONS OF LAW

1. This court has jurisdictions over the parties to this action and the subject matter of this action.

2. Farm Credit Bank of Saint Paul is the sole rightful owner and has legal title to Lots 3 and 4; E 1/2 SW 1/4; All in Section 19, Township 129 North, Range 61 West; Lots 1, 2, 3 and 4; E 1/2 W 1/2; NE 1/4; All in Section 30,

Township 129 North, Range 61 West; Lots 1, 2, 3 and 4; E 1/2 W 1/2; E 1/2; All in Section 31, Township 129 North, Range 61 West, Dickey County, North Dakota, together with all improvements thereto, including but not limited to all buildings, grain bins and fencing on said property; EXCEPT: West 1,000 feet of the South 600 feet of the SW 1/4 of Section 19, Township 129 North, Range 61 West; Dickey County, North Dakota.

3. The defendants have no further ownership rights in said real property and are unlawfully detaining and possessing the same and are trespassing upon the same.

4. The defendants are immediately required to vacate and remove themselves and their property, to-wit; their cattle, grain, farm machinery and equipment from said real estate.

5. Ten days after the date notice of entry of judgment is provided,, the Sheriff of Dickey County shall remove the defendants and the defendants' personal property from the

subject real estate and prevent the defendants from re-entering upon the same.

6. If the defendants do not remove their personal property from the subject real estate within 10 days from the date notice of entry of this judgment is provided to the defendants, the Sheriff of Dickey County and the plaintiff shall be empowered to make the necessary arrangements to remove the defendants' property from the subject real estate, with said property to be transported to elevators, livestock sales barns, and a farm auctioneer as appropriate for the purpose of liquidation with the proceeds of the sale being applied first to any expenses the plaintiff and the Sheriff of Dickey County have incurred in taking possession of; transporting and liquidating said property, and the balance to be remitted to the defendants according to their ownership interest in the personal property liquidated. If any of the personal property has inconsequential sale value, it shall be disposed of.

7. The defendants are permanently enjoined from interfering with plaintiff's ownership and possessory rights in the subject real estate.

8. Plaintiff is entitled to recover damages from the defendants in the sum of $65.00 per month from November 16, 1988 until the date the defendants vacate the subject premises and remove their personal property therefrom. Upon the defendants' vacation of the subject property and removal of their personal property, an amended judgment shall be entered by this Court based upon an affidavit submitted by the plaintiff establishing the date of removal of the defendants' personal property and defendants vacation of the subject real estate. In addition plaintiff shall be entitled to its costs and disbursements incurred herein.

9. If necessary, the Clerk of the Dickey County Court Court shall issue an appropriate writ of assistance and/or execution directed to the Sheriff of Dickey County.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

/s/ G. Neuharth

Judge of the County Court

Appendix C
Judgment
Dickey County Court

IN COUNTY COURT, DICKEY COUNTY,
NORTH DAKOTA

Farm Credit Bank of St. Paul, formerly known as the Federal Land Bank of St. Paul, a corporation,	)
Plaintiff,	)
vs.	)
JUDGMENT	)
Agnes Irene Martinson and John Martinson,	)
Defendants.	)

The above entitled matter came on before this Court for hearing before the Dickey County County Court on the 5th day of April, 1989, at the hour of 10:30 o'clock a.m. before the Honorable Gary Neuharth, Judge of the County Court for Dickey County in the courtroom of the Dickey County Courthouse, Ellendale, North Dakota. The plaintiff was represented by its attorney, Jon R. Brakke of the firm of Vogel, Brantner, Kelly, Knutson, Weir & Bye, Ltd. The defendants appeared personally. This Court having entered its findings of fact, conclusions of law and

order for judgment,

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. Farm Credit Bank of Saint Paul is the rightful owner and has legal title to Lots 3 and 4; E 1/2 SW 1/4; All in Section 19, Township 129 North, Range 61 West; Lots 1, 2, 3 and 4; E 1/2 W 1/2; NE 1/4; All in Section 30, Township 129 North, Range 61 West; Lots 1, 2, 3 and 4; E 1/2 W 1/2; E 1/2; All in Section 31, Township 129 North, Range 61 West, Dickey County, North Dakota, together with all improvements thereto, including but not limited to all buildings, grain bins and fencing on said property; EXCEPT: West 1,000 feet of the South 600 feet of the SW 1/4 of Section 19, Township 129 North, Range 61 West; Dickey County, North Dakota.

2. The defendants have no further ownership rights in said real property and are unlawfully detaining and possessing the same and are trespassing upon the

same.

3. The defendants are required to immediately vacate and remove themselves and their property, to-wit; their cattle, grain, farm machinery and equipment, from said real estate.

4. If the defendants do not immediately vacate and remove themselves and their personal property from the subject real estate within 10 days from the date notice of entry of this judgment is given to the defendants, the Sheriff of Dickey County shall remove the defendants and defendants' personal property from the subject real estate, and prevent the defendants from re-entering upon the same.

5. If the defendants do not remove their personal property from the subject real estate within 10 days from the date notice of entry of this judgment is provided to the defendants, the Sheriff of Dickey County and the plaintiff shall be empowered to make the

necessary arrangements to remove the defendants' property from the subject real estate with said property to be transported to elevators, livestock sales barns and a farm equipment auctioneer as appropriate for the purpose of liquidation with the proceeds of sale being applied first to any expenses that the plaintiff and the Sheriff of Dickey County have incurred in taking possession of transporting and liquidating said property with the balance to be remitted to the defendants according to their ownership interests in the personal property liquidated. If certain of the personal property is adjudged to have no value so that sale of the same is not merited it shall be disposed of appropriately by the plaintiff and the Sheriff of Dickey County.

6. The defendants are permanently enjoined from interfering with plaintiff's ownership and possessory rights in the subject real estate.

7. The plaintiff shall recover damages from the

defendants for its costs and disbursements incurred herein in the sum of $81.50, together with rent at the rate of $65.00 per month for the period of time the defendants have held over possession of the subject real estate.

/s/ Marie Schlenker --

Clerk of the County Court

Appendix D
Letter Denying Petition for Rehearing

State of North Dakota
SUPREME COURT
CLERK OF THE SUPREME COURT
MRS. LUELLA DUNN

JUDICIAL WING, FIRST FLOOR
600 EAST BOULEVARD AVENUE
BISMARCK, ND 58505-0530
(701) 224-2221

April 27, 1990

Mr. James R. Britton
Attorney at Law
P.O. Box 665
Rolla, ND 58367

RE: Farm Credit Bank of St. Paul v. Martinson
Supreme Court No. 890237

The Supreme Court has today entered an order denying the petition for rehearing in this case.

In accordance with Rule 41(a), NDRAppP, the mandate of the Supreme Court will be forwarded to the Clerk of the County Court after the expiration of seven days.

Sincerely yours,

/s/ Luella Dunn

Luella Dunn
Clerk

North Dakota Supreme Court
LD/ls

cc: Mr. Jon R. Brakke
The Honorable Gary D. Neuharth

Appendix E
Partial Transcript of Eviction Trial
pp. 133 - 135

STATE OF NORTH DAKOTA IN COUNTY COURT

COUNTY OF DICKEY

Farm Credit Bank of St. Paul, formerly known as the Federal Land Bank of Saint Paul, a corporation,

Plaintiff,

CASE NO. 89-12

vs.

Agnes Irene Martinson and John Martinson,

Defendants.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HON. GARY D. NEUHARTH,
JUDGE PRESIDING

Dickey County Courthouse
Ellendale, North Dakota
Commencing April 5, 1989

APPEARANCES

FOR THE PLAINTIFF:

MR. JON R. BRAKKE
Attorney At Law
502 First Avenue North
P.O. Box 1389
Fargo, ND 58107

FOR THE DEFENDANTS:

MR. JOHN W. MARTINSON
Pro Se
RR 1, Box 44
Guelph, ND 58447

THE COURT: The Court briefly reopened th record for the benefit of Mr. Martinson. The Court tacitl had agreed with position of the Plaintiff in all areas of it argument. This would include the argument that Mr Martinson presented after the close of this case as to m ruling on fixtures. As Mr. Brakke had stated, those item of personal property that become fixed or attached to th real property are real property and subject to th mortgage, subject to sale. And that's where we are o those fixtures. I know what you're going to say but I don think it makes any difference that you had a settlement, compromise or those would've been returned. The could've compromised and offered to sell you that land fo half the price of its appraised value. Had they wanted they could've accepted a lower bid but they didn't. doesn't change the nature of the outcome of this case Does that answer your question on fixtures?

MR. MARTINSON: No, well, i

regard to notice and why didn't I receive notice being with an ownership right recorded and filed against the property. And I probably didn't use those words right either, why didn't I receive notice? Why in the original Summons and Complaint was the 30 day notice before foreclosure I was named and then in the foreclosure I wasn't named? And counsel said I couldn't loose any property during that period of time. And now, granted I've tried to gain some additional time but why then would counsel come up with a conclusion that I wouldn't loose that property?

THE COURT: Who's your attorney?

MR. MARTINSON: Jack Fay said that if you aren't named, you won't loose any property. Specifically, word for word, he worked for mother but it was a really unimportant question to us at the time.

THE COURT: That wasn't litigated here today. I can't answer that question. Anything else?

MR. MARTINSON: It's outside of

(indiscernible) of the Court too but he was, my initi
argument when I filed my, it was a denial of due proce
and I question as to why, you know . . .

THE COURT: Well, I think you, either
appeal of this action, all of those arguments that you'
made, anything that I've overruled is all subject to revie
You preserved all of those. Even this idea that th
property isn't fixtures, that it's personal property belongi
to you. You've raised that. It can be a part of yo
appeal if that's what you wish to do. By the way on yo
right to appeal you can ask the appellate court for a st
of this action too. I am not inclined to grant you a sta
If you ask the trial court so that takes it out of trial cou
to the Supreme Court. If you want to ask for a stay
this eviction, that's how that works. The tapes that
have, of course, is how we make our transcripts. So you
have to let Marie know if you want one of those. But y
do have the right of appeal.

MR. MARTINSON: What is a time frame in regard to an appeal?

THE COURT: Does he have 30 days or ten days in civil?

MR. BRAKKE: It's 60 days, Your Honor.

THE COURT: Sixty days in civil.

Appendix F

Partial Transcript of Hearing on Motion for New Trial

pp. 1 - 3

STATE OF NORTH DAKOTA IN COUNTY COURT

COUNTY OF DICKEY

Farm Credit Bank of St. Paul, formerly known as the Federal Land Bank of Saint Paul, a corporation,	)
Plaintiff,	)
CASE NO. 89-12	)
vs.	)
Agnes Irene Martinson and John Martinson,	)
Defendants.	)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HON. GARY D. NEUHARTH,
JUDGE PRESIDING

Dickey County Courthouse
Ellendale, North Dakota
Commencing May 17, 1989

APPEARANCES

FOR THE PLAINTIFF:

MR. JON R. BRAKKE
Attorney At Law
502 First Avenue North
P.O. Box 1389
Fargo, ND 58107

FOR THE DEFENDANTS:

MR. JAMES R. BRITTON
Attorney at Law
P.O. Box 665
Rolla, ND 58367

STATE OF NORTH DAKOTA IN COUNTY COURT

COUNTY OF DICKEY

Farm Credit Bank of St. Paul, formerly known as the Federal Land Bank of Saint Paul, a corporation,	)
Plaintiff,	)
CASE NO. 89-12	)
vs.	)
Agnes Irene Martinson and John Martinson,	)
Defendants.	)

-oOo-

TRANSCRIPT OF PROCEEDINGS

The above entitled matter came on before the Court on May 17, 1989, at the Courthouse in the City of Ellendale, North Dakota. The Honorable Gary D. Neuharth, Judge, presiding.

Mr. Jon R. Brakke, Attorney At Law, appeared on

behalf of the plaintiff.

Mr. James R. Britton, Attorney at Law, appeared on behalf of the defendants.

The defendants appeared in person and the following proceedings were had:

THE COURT: For the record today's date is the 17th day of May, 1989. We are present in County Court of Dickey County chambered here in the city of Ellendale, North Dakota. Before the Court at this time I have a matter captioned Farm Credit Bank of St. Paul formerly known as the Federal Land Bank of Saint Paul, a corporation, plaintiff versus Agnes Irene Martinson and John Martinson, defendants. Case number 89-12. This matter was taken up several weeks ago on a matter pursuant to Chapter 33-06, which is an action for eviction. The Court granted the plaintiff's request in that matter. Subsequent to that, the defendant, John Martinson, who appears in Court this afternoon with Attorney At Law,

James Britton, asked the Court to issue a stay on parts of that judgment and to order a new trial on parts of that judgment. The plaintiff is represented this afternoon by Jon Brakke, Attorney at Law, from Fargo, North Dakota. With that brief introduction, Mr. Britton, do you have anything prior to the taking of testimony? Will there be any testimony or evidence or arguments, I don't know.

MR. BRITTON: Your Honor, I don't believe there's going to be any more testimony that will be necessary. I do have a statement that I would like to make to the Court whenever the Court wishes to hear me.

THE COURT: Would you have anything prior to his statement, Mr. Brakke?

MR. BRAKKE: No, Your Honor, thank you.

THE COURT: Proceed.

MR. BRITTON: Your Honor, I've just had an opportunity in the last few minutes to look at a transcript of the proceedings that were held before this Court on the

eviction action. And so I have not completed my review of that material and so I have to qualify my comment by saying that my comments are based upon a partial review of the transcript and my discussion of the matter with Mr. Martinson. Now, the Motion for a new trial and for a stay is premised upon Mr. Martinson's claimed ownership of several grain bins that were located upon the land which the Farm Credit Services foreclosed and took from Mr. Martinson's mother. The original Notice Before Foreclosure included John Martinson. However, the actual foreclosure action did not name Mr. Martinson as a party defendant. So he never had an opportunity to assert his rights or to litigate his interest in this land in so far as the grain bins and their location on the land being foreclosed upon as concerned. The very first time this issue actually came into Court was when the eviction action was filed and Farm Credit Services took it upon themselves to say that they had acquired ownership when

there had been no due process type of proceedings at all to litigate Mr. Martinson's interest in these grain bins.

Appendix G

North Dakota Century Code Section 47-06-04

When any tenant upon agricultural land shall have built, erected, or placed upon such leased premises during his tenancy, any grain bin, granary, or structure for the purpose of housing grain, and no written agreement between the landlord and the tenant has been made as to its removal, he may remove the same at any time within eight months after the termination of his lease and the vacating of said premises. The tenant shall not have said right of removal as against the owner or holder of any mortgage, deed, or conveyance which shall have been filed and recorded after the building, erection, or placing of such bin, granary, or structure, unless such tenant, within sixty days after such building erecting or placing, shall have filed in the office of the register of deeds a written notice describing the land, the character of the structure, and stating that he intends to remove such structure as provided by law.

Appendix H

Fourteenth Amendment, Section 1

United States Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

90-21

FILED
JUL 20 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. [redacted]

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JOHN MARTINSON - PETITIONER,

vs.

FARM CREDIT BANK OF ST. PAUL,
FORMERLY KNOWN AS THE FEDERAL LAND
BANK OF ST. PAUL, A CORPORATION,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF
NORTH DAKOTA

BRIEF FOR THE RESPONDENT
IN OPPOSITION TO PETITION

Mart R. Vogel
Attorney for Respondent
502 First Avenue North
P.O. Box 1389
Fargo, North Dakota 58107
(701) 237-6983

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Whether a tenant agricultural real estate who places improvements thereupon and who loses his or her right to sever the improvements as a consequence of failing to follow statutory notice requirements must be named as a defendant in a foreclosure action instituted by the holder of a mortgage on the leased property.

2. Whether the loss of the right by a tenant to sever improvements placed upon agricultural real estate, which loss occurs as a consequence of the tenants failure to follow statutory notice requirements, involves sufficient state action to implicate the due process requirements of the Fourteenth Amendment.

3. Whether the due process requirements of the Fourteenth Amendment are satisfied if a tenant is allowed to

litigate his or her claims to improvements placed by the tenant upon agricultural real estate in the context of an eviction action commenced after the mortgagee has acquired title to the subject real estate.

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United States Constitution

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NO. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

OCTOBER TERM, 1990

JOHN MARTINSON - PETITIONER,

vs.

FARM CREDIT BANK OF ST. PAUL,
FORMERLY KNOWN AS THE FEDERAL LAND
BANK OF ST. PAUL, A CORPORATION,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF NORTH DAKOTA

The respondent, Farm Credit Bank of St. Paul, formerly known as the Federal Land Bank of St. Paul, respectfully requests that this Court deny the petition for writ of *certiorari* filed by John Martinson which seeks review of the decision issued in this case by the North Dakota Supreme Court on March 29, 1990.

OPINIONS BELOW

The opinion of the North Dakota Supreme Court is reported at 453 N.W.2d 816 (N.D.1990). It is reproduced in Appendix A to this brief.

JURISDICTION

This is as stated in the petitioner's petition.

CONSTITUTIONAL PROVISIONS INVOLVED

This is as stated in the petitioner's petition.

STATEMENT OF THE CASE

In 1981, Constitutional Martinson obtained a loan from the Respondent, Farm Credit Bank of St. Paul (hereinafter sometimes referred to as the "Bank"). Said loan was in the principal sum of $247,000.00 and was memorialized by a promissory note of date July 22, 1981. Record at 14 *Farm Credit Bank of St. Paul v. Martinson*, 453 N.W.2d 816, 817 (N.D.1990). To secure her payments on this note, Constitutional Martinson granted the Bank a mortgage in farmland she owned in Dickey County, North Dakota. Record at 15.

Prior to Constitutional Martinson mortgaging her farmland to the Bank she had rented this property to her son, the petitioner, John Martinson. During his tenancy and before the Bank obtained its mortgage, John Martinson erected 12 grain

bins on the leased land. No severance agreement, which would have permitted John Martinson to remove the bins at the end of his lease term, was ever negotiated and contrary to NDCC § 47-06-04, John Martinson failed to file written notice with the county registrar of deeds of his intent to remove the grain bins at the end of his tenancy. *Farm Credit Bank of St. Paul v. Martinson*, 453 N.W.2d 816, 817 (N.D. 1990).

Constitutional Martinson defaulted on the payments due to the Bank and ultimately the Bank instituted foreclosure proceedings. Record at 16 and 17. During the course of the foreclosure action, a settlement was reached whereby Constitutional Martinson consented to the entry of a judgment of mortgage foreclosure in favor of the Bank. *Farm Credit Bank of St. Paul v. Martinson*, 453

N.W.2d 816, 817 (N.D. 1990). A sheriff's sale of the mortgaged property was held on November 10, 1987. Record at 18. The Bank was the high bidder at the sheriff's sale and the issuance of sheriff's certificates of sale to the Bank was approved by the Dickey County District Court. Record at 19. At the end of the one year redemption period, the Sheriff of Dickey County issued sheriff's deeds to the Bank. Record at 22 and 23.

Subsequent to the Bank acquiring title and without the Bank's consent, Constitutional Martinson and the petitioner, John Martinson, continued to use and occupy the subject property. Record at 27 and 28. An eviction action was commenced by the Bank in Dickey County County Court. Trial in that case occurred on April 5, 1989 and a judgment of eviction was entered in favor of the Bank.

Farm Credit Bank of St. Paul v. Constitutional Martinson and John Martinson, No. 89-12, Dickey County Court, Ellendale, ND. As part of its judgment the trial court found that the grain bins erected by John Martinson constituted fixtures on Constitutional Martinson's farmland, that the bins had become Constitutional Martinson's property since John Martinson failed to preserve his rights to sever the same and that thus the bins had been acquired by the Bank through its foreclosure action. *Farm Credit Bank of St. Paul v. Martinson*, 453 N.W.2d 816, 817 (N.D. 1990).

The petitioner filed a Motion for New Trial and Motion for Stay. These motions were denied by Dickey County County Court on May 24, 1989. The petitioner then appealed from the "Order of Eviction" and

the Order denying Motion for New Trial and Motion for Stay.

On appeal to the North Dakota Supreme Court, the petitioner argued that the grain bins he erected on the farmland during his tenancy were his personal property and that he was denied due process by not being made a party to the Bank's foreclosure proceedings. *Id.* at 818. The North Dakota Supreme Court rejected Martinson's contention on this point and affirmed the judgment of eviction. *Id.* at 818.

REASONS WHY THE WRIT SHOULD BE DENIED

The Fourteenth Amendment to the United States Constitution provides that a party can be deprived of property rights only if accorded due process. However, this guarantee of due process is applicable only if state action is involved. *Tulsa Professional Collection*

Services, Inc. v. Pope, 485 U.S. 478, 485, 108 Supreme Court 1340, 99 Lawyers Edition 565 (1988). In the *Tulsa* case, a creditor's assignee brought suit against an estate to recover on a debt owed by the decedent. *Id.* at 482. Under Oklahoma law, once the executor of an estate is appointed, he or she must publish notice to creditors. *Id.* at 481. If a creditor fails to file a claim within two months of the date notice is published, the claim is barred. *Id.* The Plaintiff in *Tulsa* failed to timely file a claim with the estate's executor and thus the Oklahoma courts found that the plaintiff's claim was barred. *Id.* at 482.

In finding for the Appellant in *Tulsa*, this Court held that

where state action adversely affects property interests, the due process clause of the Fourteenth Amendment requires that

actual notice be provided to any affected parties whose identities and addresses are reasonably ascertainable. *Id.* at 490. However, only reasonably diligent efforts need be made to uncover the identities of interested parties and notice by publication can suffice as to parties whose identities are not reasonably ascertainable. *Id.*

The type of due process issues involved in the *Tulsa* case do not exist in the instant action. John Martinson's loss of his rights in the grain bins he erected on the property he was leasing from his mother did not come about as a consequence of state action and resulted solely from Martinson's failure to avail himself of available statutory and common law mechanisms to protect his interest in the grain bins.

In North Dakota the general rule is that where a tenant affixes an improvement to leased real estate and fails to negotiate a severance agreement with the landlord, the improvement becomes the landlord's property. However, North Dakota has established special rules by statute to deal with certain improvements to agricultural real estate. Pursuant to North Dakota Century Code §47-06-04, if a tenant erects grain bins on leased property and no written agreement for removal of the grain bins is negotiated between the landlord and the tenant, the tenant has the right to remove the grain bins within eight months of termination of the lease. However, a tenant does not have this right of removal as against the holder of a mortgage recorded after the grain bins are erected unless, within sixty days of the date the tenant places

the grain bins on the leased property, the tenant files with the county registrar of deed's office written notice of his intent to remove the same at the end of the lease.

Had the petitioner, John Martinson, wished to protect his ownership rights in the grain bins as against the holder of any mortgage his mother might subsequently place on the leased premises, he could have negotiated and filed a severance agreement or he could have filed the notice required by North Dakota Century Code § 47-06-04. By failing to file the statutorily required notice the petitioner lost his interest in the grain bins when his mother mortgaged the underlying real estate. The grain bins automatically became the property of his mother and thus, at the time the Bank commenced its foreclosure action against Constitutional

Martinson, John Martinson no longer had an ownership interest in the bins to which due process rights could attach.

Any due process analysis in this case should focus not on the foreclosure action the Bank commenced against the petitioner's landlord, but rather on the provisions of North Dakota Century Code § 47-06-04, which in essence, determined Martinson's rights in the grain bins. In that North Dakota Century Code §47-06-04 provided the petitioner with a simple method of protecting his rights in the grain bins as against any party acquiring a mortgage in the leased real estate, the statute clearly meets constitutional muster.

A second significant difficulty with the petitioner's due process arguments is that since his rights were determined by a statute which is self-executing in nature,

there was insufficient state involvement in the determination of Martinson's rights to implicate the due process protection of the Fourteenth Amendment. As this court discussed in the *Tulsa* case, where the state's role is limited to enactment of a statute, which simply serves to define or limit rights, state action sufficient to invoke the protection of the due process clause will not be found. Similarly, private use of state established remedies or procedures does not rise to the level of state action. In the instant case, John Martinson forfeited his rights in the grain bins by failing to follow the requirements of North Dakota Century Code §47-06-04, (i.e. he failed to file notice of his intention to remove the grain bins at the end of his lease term, so as to protect his interest in the grain bins as against the mortgage his mother granted to

the Bank). The provisions of North Dakota Century Code §47-06-04, which serve to terminate a tenant's ownership interest in grain bins placed on leased property, are as self-executing as statutes of limitation. In this case, the state played no role beyond enactment of North Dakota Century Code §47-06-04.

The third principal difficulty with the petitioner's due process argument is that at the time the Bank instituted its foreclosure action against Constitutional Martinson, any interest the petitioner might have had in the mortgaged property was not reasonably ascertainable by the Bank and thus the Bank had no obligation to name Martinson in the foreclosure action. At the time the Bank instituted its foreclosure action, petitioner's property interest in the grain bins was not filed with the county registrar of

deeds pursuant to North Dakota Century Code § 47-06-04. Thus the petitioner's interest was not reasonably ascertainable. Even if the Respondent was obligated to use reasonably diligent efforts, petitioner's alleged interest in the foreclosed land could not have been reasonably ascertained. Therefore, petitioner was not denied any due process rights by not being named as a defendant in the Bank's foreclosure action.

The petitioner argues that a financing statement filed with the County Registrar of Deed's office that listed him as a borrower on an ASCS loan given for the construction of certain grain bins on the subject property, provided sufficient notice of his interest in the grain bins to require that he be named as a Defendant in the Bank's foreclosure action. This argument is without merit. petitioner

fails to note that at the time the foreclosure action was instituted, the financing statement in question had lapsed. Furthermore, the fact the petitioner may have been obligated to the Agricultural Stabilization and Conservation Service, with respect to a loan given for the construction of grain bins on the subject property, does not mean that the petitioner was the owner of the bins or had any interest in the subject real estate.

The final defect in the petitioner's due process argument is that the petitioner was given every opportunity to litigate his interest in the grain bins during the course of the eviction action the Bank commenced against the petitioner and Constitutional Martinson. The petitioner specifically put ownership of the grain bins at issue during the course

of the eviction action. However, he failed to establish either that he had a severance agreement with Constitutional Martinson or that he had complied with the filing requirements of North Dakota Century Code § 47-06-04 so as to preserve his severance rights against parties acquiring mortgages in the subject real estate. Based on the evidence presented to it, the Court which tried the eviction action held John Martinson had lost his interest in the grain bins to Constitutional Martinson by the time the Bank instituted its foreclosure action and that the Bank had successfully foreclosed as against Constitutional Martinson's interest in the grain bins.

CONCLUSION

Since the petitioner had no ownership rights in the subject grain bins at the time the Bank instituted its foreclosure

action against Constitutional Martinson due process did not require that the petitioner be named as a defendant in that foreclosure action. The petitioner was also given every opportunity to litigate whatever claim he had in the grain bins during the course of the eviction action instituted against him by the Bank. The trail court in the eviction action correctly held that as a consequence of the petitioner failing to preserve his rights to sever the improvements to the mortgaged property he had lost any ownership interest in the same prior to the time the Bank commenced its foreclosure action against the owner of said property.

Dated July 13, 1990.

Respectfully submitted,

Mart R. Vogel
Attorney for Respondent

APPENDIX A

OPINION OF THE NORTH DAKOTA SUPREME COURT

FARM CREDIT BANK OF ST. PAUL, formerly known as the Federal Land Bank of St. Paul, a corporation, Plaintiff and Appellee,

v.

Agnes Irene MARTINSON, Defendant,

and

John Martinson, Defendant and Appellant.

Civ. No. 890237.

Supreme Court of North Dakota.

March 29, 1990.

After mortgagor consented to entry of judgment of foreclosure by mortgagee, mortgagee purchased mortgaged property at sheriff's sale and was issued deeds for unredeemed land, and mortgagee brought eviction proceeding against mortgagor and tenant who continued to use the foreclosed property without mortgagee's consent. The County Court, Dickey County, Southeast Judicial District, Gary D. Neuharth, J., ordered mortgagor and tenant to remove

their property from the subject real estate, and tenant appealed, arguing that grain bins he had erected on property during his tenancy were his personal property and that he was denied his due process rights with respect to ownership of grain bins. The Supreme Court, VandeWalle, J., held that when tenant did not file notice with county registrar of deeds that would have given subsequent mortgage holder notice of intention to remove bins, tenant failed to preserve his right to remove bins as against subsequent mortgagee.

Affirmed.

FARM CREDIT BANK v. MARTINSON N.D. 817
Cite as 453 N.W.2d 816 (N.D.1990)

1. **Mortgages 207**

For agricultural tenant to preserve right to remove grain bin against holder of mortgage recorded after erection of

bin, tenant must file description of bin and notice of his intent to remove it with county register of deeds. NDCC 47-06-04.

2. **Mortgages 207, 434**

When tenant erected grain bins on leased farmland, but did not file notice with county register of deeds that would have given subsequent mortgage holder notice of tenant's intention to remove bins, tenant failed to preserve right of removal against mortgagee whose mortgage was recorded subsequent to erection of bins, and thus, there was no reason to include tenant as party to foreclosure proceedings and mortgagee which was high bidder at sheriff's foreclosure sale was entitled to use of bins.

NDCC 47-06-04.

Jon R. Brakke of Vogel, Brantner, Kelly, Knutson, Weir & Bye, Ltd., Fargo, for plaintiff and appellee.

James R. Britton, Rolla, for defendant and appellant.

VANDE WALLE, Justice.

John Martinson appealed from a judgment of eviction entered by the county court for Dickey County. Martinson contends that the court improperly determined that Farm Credit Bank of St. Paul was the owner of twelve grain bins situated on the property. We affirm.

John Martinson was a tenant on a farm owned by his mother, Agnes Irene Martinson. The farm was located in Dickey County. During his tenancy, John erected twelve grain bins on the leased farmland. John did not negotiate a severance agreement with Agnes regarding the removal of the grain bins upon the expiration of

his tenancy, nor did John file a notice with the office of the register of deeds stating that he intended to remove the grain bins at the end of his lease term as permitted by NDCC § 47-06-04.

In 1981, Agnes obtained a loan from Farm Credit Bank of St. Paul in the principal sum of $247,000. The loan was memorialized by a promissory note, and secured by a mortgage on her farmland. When Farm Credit Bank extended the loan to Agnes and recorded the mortgage, the twelve grain bins were already constructed and affixed to the farmland.

Agnes defaulted on the payment due under the note and Farm Credit Bank ultimately instituted foreclosure procedures. During the course of the foreclosure action a settlement was reached whereby Agnes consented to the entry of a judgment of foreclosure by Farm

Credit Bank. Farm Credit Bank was the high bidder at the sheriff's sale and it was issued certificates of sale by the sheriff. During the redemption period Agnes redeemed a fifteen-acre parcel of the mortgaged property. The grain bins in controversy are not situated on the fifteen acres redeemed by Agnes. The sheriff subsequently issued sheriff's deeds to Farm Credit Bank for the remaining unredeemed land.

After sheriff's deeds were issued to Farm Credit Bank, John and Agnes Martinson continued to pasture livestock and to store grain, farm machinery, and motor vehicles on the foreclosed property although Farm Credit Bank did not consent to the Martinsons' continued occupancy of the land. Farm Credit Bank eventually commenced an eviction proceeding in the county court for Dickey County. A hearing

was held on the eviction action and the county court subsequently issued its findings of fact, conclusions of law, and order for judgment. In its findings of fact the court determined that Farm Credit Bank acquired deeds to the farmland in issue through its foreclosure proceeding, that the grain bins erected by John Martinson constituted fixtures on the farmland and became a part of the property acquired by Farm Credit Bank through its foreclosure, and that John and Agnes Martinson were currently pasturing cattle, storing farm equipment, and storing agricultural cattle upo Farm Credit Bank's land. The trial court ordered John and Agnes Martinson to remove their property from the subject real estate.

On appeal, John Martinson argues that the twelve grain bins he erected on the farmland during his tenancy were his personal property. Because he was not a party to the foreclosure proceedings, John contends that he was denied his due-process rights with respect to ownership over the grain bins when the county court found that the bins were fixtures on the property and that Farm Credit Bank had acquired ownership rights to the bins when it successfully foreclosed on Agnes's farmland. John appears to argue that title to the grain bins was determined in the foreclosure proceedings and that in order to protect his due-process rights he should have been made a party to the foreclosure proceedings or, because he was not a party in those proceedings, the county court should have held the eviction action in abeyance until the district

court has determined title to the grain bins in a separate action in which John is a party. We disagree.

[1,2] Under NDCC § 47-06-04, when a tenant affixes his or her property to the land of another without an agreement for its removal, the property affixed belongs to the owner of the land upon the termination of the tenancy. *See also Schnaible v. City of Bismarck*, 275 N.W.2d 859 (N.D. 1979); *Frank v. Schaff*, 123 N.W.2d 827 (N.D. 1963); *Gussner v. Mandan Creamery & Product co.*, 78 N.D. 594, 51 N.W.2d 352 (1952); *Klocke v. Troske*, 57 N.W. 404, 222 N.W. 262 (1928). However, § 47-06-04 also contains a special provision which applies to grain bins erected on leased premises by agricultural tenants:

> "When any tenant upon agricultural land shall have built, erected, or placed upon such leased premises during his tenancy, any grain bin, granary,

> or structure for the purpose of housing grain, and no written agreement between the landlord and the tenant has been made as to its removal, he may remove the same at any time within eight months after the termination of his lease and the vacating of said premises. *The tenant shall not have said right of removal as against the owner or holder of any mortgage, deed, or conveyance which shall have been filed and recorded after the building, erection, or placing of such bin, granary, or structure, unless such tenant, within sixty days after such building erecting or placing, shall have filed in the office of the register of deeds a written notice describing the land, the character of the structure, and stating that he intends to remove such structure as provided by law.* (emphasis added).

Thus, in order for an agricultural tenant to preserve the right to remove a grain bin against a holder of a mortgage recorded after the erection of the bin, the tenant must file a description of the bin and a notice of his or her intent to remove it with the county register of

deeds. White & Skjerven, *A Survey of Laws Affecting Farm Tenancy*, 37 N.D.L.Rev. 158, 179 (1961).[1]

From our review of the record and transcripts of the county court eviction action, it is clear that the grain bins in controversy were erected on the leased property by John Martinson prior to the recordation of Farm Credit Bank's mortgage. Moreover, John Martinson did not file a notice with the county register of deeds which would have given Farm Credit Bank, as the holder of a mortgage, any notice of John's intention to remove

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[1] While stating that NDCC 47-06-04 provides rather harsh rules for the removal of fixtures by tenants, A Survey of Laws Affecting Farm Tenancy, 37 N.D.L.Rev. 158, 179-80 (1961), notes the harshness of the statute may be mitigated by tenants if they comply with its terms. Thus, for example, the harshness of 47-06-04 can be mitigated by constructing agreements with landlords regarding the removal of fixtures, or by filing a notice with the register of deeds stating that an agricultural tenant plans to remove grain bins at the expiration of his or her lease.

the bins. When John failed to record a notice stating his intention to remove the bins at the end of his lease, he failed to preserve his right of removal against the subsequent mortgagee. As a result, there was no reason to include John as a party in the foreclosure proceedings. Cf. NDCC §§ 32-19-28, 32-19-39, 32-19-40. Farm Credit Bank became the owner of the real estate, including the grain bins, as a

result of the sheriff's deeds, and was entitled to evict the Martinsons from the real estate and the use of the bins.

The judgment of eviction is affirmed.

ERICKSTAD, C.J., MESCHKE, J., and VERNON R. PEDERSON, Surrogate Judge, and HODNY, District Judge, concur.

VERNON R. PEDERSON, Surrogate Judge, and HODNY, District Judge, sitting in

place of GIERKE and LEVINE, JJ., disqualified.